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IN THE

Supreme Court of the United States

No. 77-1592

BOBBY C. CAMBRON, et al., APPELLANTS

V.

CANAL INSURANCE CO., APPELLEE

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

Motion To Dismiss Or Affirm

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V.

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ON APPEAL FROM THE SUPREME COURT OF GEORGIA

Motion To Dismiss Or Affirm

Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the decision of the Supreme Court of Georgia on the ground that the Appellants have not properly brought their appeal within the provisions of 28 U.S.C. § 1257(2); on the ground that the appeal presents no substantial federal question; and upon the ground that the decision of the Supreme Court of Georgia was based upon adequate nonfederal bases. If construed as a petition for writ of certiorari, Appellee urges that the petition be denied.

I.

STATEMENT OF THE CASE

This appeal has been taken pursuant to 28 U.S.C. § 1257(2) seeking review of a decision of the Supreme

Court of Georgia which reversed the grant by a lower State trial court of certain motions for summary judgment and affirmed the lower court's grant of a motion to dismiss certain counterclaims.

The factual and procedural background of the case has been set out in various orders and decisions issued by the several courts which have been presented different aspects of this case, but for the sake of continuity, Appellee will briefly recite the salient facts leading to this appeal.

This dispute arose out of an automobile accident in which Mr. and Mrs. Hilton were injured while riding as passengers in a taxi driven by one Glover. Mr. Hilton later died of his injuries as did Glover. Suit was brought by Mr. and Mrs. Hilton in the Superior Court of Polk County, Georgia, against Glover. Defense of this suit was undertaken by Appellee, Canal Insurance Company, which had issued to him a policy of liability insurance. Prior to trial, however, Canal withdrew from the defense, contending that the insurance policy at issue had been cancelled by Canal prior to the collision. The case was called for trial and the Deputy Clerk of the Superior Court, Cambron, was appointed Glover's administrator on the day of trial. Counsel for plaintiff represented Cambron in the effort to have him appointed administrator of Glover's estate. Cambron adopted the defensive pleadings earlier filed by Canal prior to their withdrawal, but when the case was called for trial, he did not appear on behalf of Glover and default judgments were entered against Glover. Following a hearing on damages, the trial court directed the jury to enter verdicts in favor of the Hiltons in the amounts sought in the complaint, *i.e.*, $250,000 for Mr. Hilton and $100,000 for Mrs. Hilton.

Cambron, as administrator, then filed suit against

Appellee to recover under the insurance policy. This suit was removed to the United States District Court for the Northern District of Georgia. Canal then filed a suit in equity in the Superior Court of Polk County, Georgia, seeking to set aside the default judgments entered against Glover in favor of the Hiltons.

The district court declined to adjudicate on motion the validity of judgments obtained against Glover in the Polk Superior Court, but granted a summary judgment in favor of the defendant Cambron on the issue of Canal's liability under the policy issued to Glover. The court then stayed its judgment pending decision of the action brought by Canal in equity to set aside the original default judgments.

In the action in equity, the Polk Superior Court granted defendants' motions to dismiss and for summary judgment. The superior court also dismissed the counterclaim of defendants against Canal based upon abuse of process.

Appeal was then taken to the Supreme Court of Georgia by Appellee herein, Canal Insurance Company. Assigned as error was the grant of defendant's motions to dismiss and for summary judgment and the denial of Canal's motion for summary judgment in its favor. A cross-appeal was asserted by defendants challenging the dismissal of the counterclaim.

The Georgia Supreme Court reversed the grant of the judgment against Canal and affirmed the dismissal of the counterclaim. The court in essence concluded that Canal could properly attack the default judgments in the trial court and further held that, as a matter of Georgia law, it was error for the trial judge in the default actions to

have directed the jury to return a verdict for a specified amount. The court further held, with regard to Mrs. Hilton, that service of process was proper under Ga. Code Ann. § 81A-104(e)(2). *See Canal Insurance Company v. Cambron*, 240 Ga. 708 (1978).

Appellants herein filed in the Supreme Court of Georgia, as appellees, a motion for rehearing which was denied on February 8, 1978. In that motion they assigned various grounds of error in the decision of the Supreme Court of Georgia. Interwoven with other allegations of error were allegations that Appellants' constitutional rights had been infringed by the decision of the Georgia Supreme Court. Those allegations in that motion for rehearing was the first instance in which federal or constitutional issues had been raised by these parties.

The motion for rehearing was summarily denied without opinion. Appellants then filed their notice of appeal with the Supreme Court of Georgia, and on May 8, 1978, docketed their appeal in this Court and filed their Statement as to Jurisdiction.

II.

ISSUES PRESENTED

1. Must not this appeal be dismissed on the grounds that the decision of the Supreme Court of Georgia was not a final decision as required under 28 U.S.C. § 1257?
2. Must not the appeal be dismissed on the grounds that the federal questions presented have not been timely raised by appellants?
3. Must not the appeal be dismissed on the grounds that the issues raised do not fall within the provisions of 28 U.S.C. § 1257(2)?

4. Must not the appeal be dismissed on the ground that Appellants have failed to present a substantial federal question and because it is manifest that the questions presented are so insubstantial as not to need further argument?
5. Must not the appeal be dismissed on the ground that the decision of the Supreme Court of Georgia was clearly based upon adequate nonfederal bases?
6. If the Court sustains Appellee's position that this appeal is not proper under 28 U.S.C. § 1257(2), but proceeds to consider the application as a petition for writ of certiorari as provided under 28 U.S.C. § 2103, must not the petition be denied on the grounds that the issues raised are insubstantial and present no important question of federal law?

III.

ARGUMENT

1.

The Appeal Must Fail Because The Decision Appealed From Is Not A Final Decision As Required Under 28 U.S.C. § 1257(2).

This appeal involves a purported constitutional issue first raised on motion for rehearing after the Georgia Supreme Court reversed the trial court's grant of summary judgment in favor of defendants. On remand, Canal Insurance Company will be permitted to present its case for the proposition that the judgments against Glover must be set aside *in toto*. While a number of legal issues of importance under State law were decided in the decision of the supreme court, the decision of the supreme cou

was clearly not "final" in the sense required under 28 U.S.C. § 1257.

Section 1257 provides for review by this Court only of final decisions or decrees rendered by the highest court of a State in which a decision could be had.

> Final it must be in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.

Market Street Railway Co. v. Railroad Commission of California, 324 U.S. 548, 551 (1945). As a general rule, the judgment of the highest State court relative to a demurrer or a motion to dismiss a complaint is final only where the case is thereby disposed of conclusively, as where the granting of such a motion is sustained. *See Missouri and Kansas Interurban Railway Co. v. City of Olathe*, 222 U.S. 185 (1911); *Clark v. City of Kansas City*, 172 U.S. 334 (1899); *Meagher v. Minnesota Thresher Manufacturing Co.*, 145 U.S. 608, 610-11 (1892). Where, as here, there remain significant further proceedings in the trial court following remand, the adjudication by the Supreme Court of Georgia clearly cannot be considered final for jurisdictional purposes. *See Urie v. Thompson*, 337 U.S. 163, 171-72, (1949); *Laclede Gas Light Co. v. Public Service Commission of Missouri*, 304 U.S. 398 (1938); *Cincinnati Street Railway Co. v. Snell*, 179 U.S. 395 (1900).

The Court will readily see that this is a case which fits within the traditional rule that the reversal of the grant of a motion to dismiss or of summary judgment is not a final decision for purposes of appeal. Appellee recognizes that this rule has been severly eroded under several recent

decisions of the Court. However, in each case in which review has been undertaken where the strict requirements of finality were in fact lacking, there have been overriding considerations requiring that review be had in spite of deficiencies in finality. Thus, where the decision of the federal issue is conclusive of the further proceedings remaining in the State courts, or if the federal issue preordains the outcome in the State courts, the strict requirements of finality will not be observed. *See, e.g., Mills v. Alabama*, 384 U.S. 214 (1966); *Pope v. Atlantic Coast Line Railroad Co.*, 345 U.S. 379 (1953). And, where the federal issue will survive and require decision regardless of the outcome of the State court proceedings, jurisdiction has on occasion been sustained. *See Radio Station WOW v. Johnson*, 326 U.S. 120 (1945). Other cases illustrate other "exceptions" to the rule of finality. *See Construction Laborers v. Curry*, 371 U.S. 542 (1963); *Mercantile National Bank v. Langdeau*, 371 U.S. 555, (1963). But, in each of these instances, special considerations were found obviating the requirement of strict finality. These special considerations have included the particular concern of the Court that a statute inhibiting freedom of speech be promptly reviewed, *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975), and that national labor policy not be eroded by tardy review of claims going to the preemption of State labor policy by the federal law. *See Construction Laborers v. Curry*, 371 U.S. 542 (1963). *See also Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). None of these special considerations are present in the instant case. As Appellee will show, *infra*, the constitutional issues raised by Appellants in this appeal are insubstantial, indeed frivolous. They do not raise any issue of importance to federal law.

Accordingly, Appellee submits that this case presents, at most, a premature appeal. The traditional rule requiring a final decision from the highest court of the State dictates that Appellants' claims be dismissed and the appeal denied.

2.

The Appeal Must Fail Because The Federal Questions Sought To Be Reviewed Have Not Been Timely Raised.

It is well established that before review will be proper under 28 U.S.C. § 1257(2), the claim of invalidity of a State statute must have been brought to the attention of the State court with fair precision and in due time. *Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). *Accord*, *Street v. New York*, 394 U.S. 576, 584 (1969). In the instant appeal, the purported constitutional and federal issues were first raised on motion for rehearing before the Supreme Court of Georgia. It is the long established general rule that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the State court actually entertains the petition and expressly decides the question. *See Herndon v. State of Georgia*, 295 U.S. 441, 443 (1935); *Hanson v. Denckla*, 357 U.S. 235 (1958); *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945). Where the State court entertains such a petition, the order denying the petition for rehearing must be more than a cursory recitation that the petition has been considered and is denied. *See Consolidated Turnpike Co. v. Norfolk & Ocean View Railway Company*, 228 U.S. 326, 333-334 (1913); *Forbes v. State Counsel of Virginia*, 216 U.S. 396 (1910); *McCorquodale v. Texas*, 211 U.S. 432, 436-437 (1908). In other words,

the court must expressly consider and dispose of the constitutional issues raised on the motion for rehearing. *See Radio Station WOW v. Johnson*, *supra* at 128.

Appellee, of course, recognizes that an exception to the above rule may arise where the State court's ruling could not have been anticipated and the petition for rehearing therefore presented the first opportunity for raising the federal question. *See Herndon v. State of Georgia*, 295 U.S. 441, 443 (1935). Appellants are apparently proceeding under this exception, contending that they could not have anticipated the construction given to State law by the Georgia Supreme Court in this case.

An examination of the decision of the Supreme Court of Georgia, however, reveals that the court's decision was not a drastic departure from prior precedent, was in fact consistent with prior law, and, that, therefore, Appellants cannot properly claim surprise based upon the ruling in the Georgia Supreme Court. In support of this contention, Appellee relies upon the decision of the Supreme Court appealed from in this case. *See Canal Insurance Company v. Cambron*, 240 Ga. 708 (1978). The precedential and decisional underpinnings for that decision are clearly and explicitly set forth in the opinion of the court. Contrary to the contention of Appellants in this case, the decision of the Georgia Supreme Court was consistent with the prior development of the law in the areas treated.

Accordingly, it is clear that the constitutional issues asserted herein were not raised in a timely fashion, were not expressly passed upon by the State court, and were not questions which could not have been anticipated by the Appellants prior to the rendition of the decision. Thus, the appeal must be dismissed because not brought before the State court with fair precision and in due time.

3.

The Appeal Must Fail Because Appellants Have Failed To Bring Their Petition Within The Scope Of The Appellate Jurisdiction Of This Court As Defined In 28 U.S.C. § 1257(2).

A careful examination of Appellant's Statement as to Jurisdiction reveals that Appellants are contending they have been denied due process and equal protection of the laws because of the failure of the Supreme Court of Georgia to apply the law in the manner in which Appellants believe was proper. While the jurisdictional statement is lacking in clarity, the gravamen of the appeal appears to be that the Supreme Court of Georgia singled out these Appellants for discriminatory treatment. This contention has been joined with the further contention that Appellants have been deprived of substantive and procedural due process as a result of the position taken by the Georgia Supreme Court on the various issues raised in the case.

The equal protection contentions can be summarized on the basis of the following excerpts from Appellants' jurisdictional statement:

> "And the challenge is that these statutes are adjudged to mean one thing in this case and another thing for others." (Appellants' Statement as to Jurisdiction at 30.)
>
> "Within the time allowed by law, Defendant-Appellants filed their Motion for Rehearing in the Georgia Supreme Court, in which they enumerated the ways in which they contended they had been deprived of their property without due process of law and of equal protection of the laws by that Court's implementation of certain statutes and decisions which were unconstitutional when implemented as to Defendants in a manner different from and contrary to the rules and decisions when applied to other persons and in other cases." (Appellants' Statement as to Jurisdiction at 36.)

> "The federal questions raised in the Motion for Rehearing, we submit, are substantial and of the essence of the decision of the Supreme Court of Georgia which rejected the motion; and the judgment over-ruling the motion and reversing the trial court could not have been made except by the action taken by the Georgia Supreme Court *in implementing State statutes, decisions and procedures as to these Appellants in a manner different from that intended by Georgia statutes and different from that implemented as to other persons and cases similarly situated.*" (Appellants' Statement as to Jurisdiction at 37.) (Emphasis added.)
>
> "As we understand the rights of a citizen under the Federal Constitution, they include the right to enjoy the benefits of an adjudication obtained by them in a Federal Court, without being later deprived of such benefits by a State Court; they include the right to pursue the procedures as established by law for the resolution of their legal claims against others and have the laws controlling these procedures and remedies interpreted and implemented in their favor *and in the same manner as they are interpreted and implemented in other proceedings with reference to other persons*, as well as having such laws interpreted and implemented against them and in like manner; . . ." (Appellants' Statement as to Jurisdiction at 39.) (Emphasis added.)

Thus, the conclusion is inescapable that Appellants are contending that the Supreme Court of Georgia denied them equal protection through the discriminatory application of Georgia statutory and decisional law. When the nature of the attack is an equal protection challenge such as this, the question does not go to the validity of any statute, and consequently, does not entitle a litigant to

review under the appellate jurisdiction of this Court provided under 28 U.S.C. § 1257(2). *See Zucht v. King*, 260 U.S. 174 (1922); *Charleston Federal Savings & Loan Association v. Alderson*, 324 U.S. 182, 187 (1945); *Rohr Aircraft Corporation v. County of San Diego*, 362 U.S. 628 (1960); *Jett Brothers Distilling Company v. City of Carrollton*, 252 U.S. 1 (1920). As the above cases illustrate, it is necessary for purposes of review under 28 U.S.C. § 1257(2) that the Appellants expressly and explicitly draw into question the statute or statutes of a State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States. It is clear from the discussion in Appellants' Statement as to Jurisdiction and in Appellants' motion for rehearing before the Supreme Court of Georgia that no express or explicit attack has been lodged against any statute of Georgia on the basis of constitutional infirmity. Appellee contends that if Appellants have in fact stated any basis for review by this Court, it must be by writ of certiorari. *See* 28 U.S.C. § 1257(3).

Accordingly, Appellee urges that the Court dismiss the appeal on the basis that it does not fall within the terms of 28 U.S.C. § 1257(2) providing for review as of right of judgments or decrees rendered by the highest court of a State.

4.

The Appeal Must Fail Because It Does Not Present A Substantial Federal Question And Because It Is Manifest That The Questions Presented Are So Unsubstantial As Not To Need Further Argument.

It is axiomatic that Appellants herein may not present for review in this Court questions which have not been

properly raised in the State courts. *See, e.g., State Farm Mutual Automobile Insurance Company v. Duel*, 324 U.S. 154, 160 (1945). Accordingly, if Appellants have raised any issues reviewable in this Court, those issues must have been presented in Appellants' motion for rehearing before the Supreme Court of Georgia. Appellants admit that no federal issues were raised prior to the motion for rehearing. *See* Appellants' Statement as to Jurisdiction at 29. Appellee herein submits that an examination of the issues raised in the motion for rehearing makes it abundantly clear that no substantial federal question has been raised by Appellants herein.

The essence of the constitutional claims raised in the motion for rehearing revolve around the due process and equal protection provisions of the Constitution. The first suggestion of a constitutional issue is made at page 5 of the motion for rehearing (Appendix to Jurisdictional Statement at 26). Therein, Appellants contended as follows:

> "The Court's judgment and opinion of January 19, we submit, which positively voided the damage amounts awarded in the judgments sought to be set aside by Canal, was unquestionably erroneous in that these Appellees were and are entitled to procedural process of law and are further entitled not to have their property taken from them without equal protection of the laws."

Thus, from this contention, it appears that Appellants assert that they were denied procedural due process by the procedures followed by the Georgia Supreme Court in reversing the grant of summary judgment and in setting aside the damage awards of the Polk Superior Court in the default judgments. Appellants further suggest denial of equal protection.

The second instance in which Appellants purport to raise a constitutional issue in the motion for rehearing appears at page 8 of the motion for rehearing (Appendix to Jurisdictional Statement at 34-35). There, Appellants contended as follows:

> "We submit that this Court, in voiding the amounts of the judgments obtained by Appellees, has deprived Appellees of their property without substantive due process of law in that due process involves the treatment of all persons under the same circumstances in the same manner; and in this case unless this court grants a re-hearing and affirms the trial court's judgment on the basis of the foregoing authorities, these Appellees are having different and inapplicable standards of law applied to them than are applied generally by this Court. Appellees further contend that they are not being afforded equal protection of the foregoing principles of law as other citizens have been and are being afforded. Such deprivation and treatment, we contend, is contrary to Appellees' rights as citizens of the United States under the Fifth and Fourteenth Amendment to the Constitution of the United States."

The essential contention of this paragraph would appear to be the denial of a constitutional right based upon unequal treatment at the hands of the Supreme Court of Georgia. This theme has been reiterated in the jurisdictional statement, as the Court can readily see. In short, Appellants' contend that the Supreme Court of Georgia applied the law erroneously in favor of Canal with the effect that these Appellants were treated differently from other litigants who have come before the Supreme Court of Georgia with similar legal questions.

In addition to the foregoing contentions, at page 9 of the motion for rehearing (Appendix to Jurisdictional Statement at 35), Appellants raised, though obliquely, a constitutional issue with regard to the proceedings which had occurred in the United States District Court and which had been stayed by the district court pending resolution of the equitable action in the Polk County Superior Court. With regard to that contention, Appellants submitted as follows:

> "We respectfully submit that the ruling of this Court that the trial Court was incorrect in its ruling on summary judgment on this ground is error and deprives these Appellees of their rights to property as adjudicated and established by the judgment of the United States District Court, Northern District of Georgia, and thus is contrary to and a violation of the Fifth Amendment to the Constitution of the United States and the Fourteenth Amendment to Constitution of the United States in that they are deprived of their property without due process of law and are deprived of equal protection of the laws; . . ."

The contention herein is apparently that the proceedings in the United States District Court brought by Cambron against Canal for a determination of Canal's liability to Glover under its insurance policy somehow precluded the Polk Superior Court and the Georgia Supreme Court on the issue of the validity of the original default judgments. This contention is made in spite of the specific deferral on the issue by the district court in its Orders in that case and in its stay of judgment pending decision of the equitable issues from which decision this appeal has been taken.

The final presentation of a constitutional issue made by Appellants in the motion for rehearing appears at page 10 of the motion for rehearing (Appendix to Jurisdictional Statement at 40):

> "We submit that to construe the CPA [Georgia's Civil Practice Act] provisions relating to jury trial as preventing the State Court of Polk County from trying a civil case in the absence of a demand for jury is definitely and positively limiting the jurisdiction of that court contrary to the prohibition of such construction in the Act itself.
>
> "Such a construction has deprived Appellees of their property rights as citizens of the United States under the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States in that it is not only a failure of due process of law, but contrary to the provision of the statute being construed, and it denies to Appellees the equal protection of the laws."

This issue, as the Court will readily note, goes to the finding of the Supreme Court of Georgia that the trial judge in the default actions erred in directing the jury to award the full damages sought by the plaintiffs in that case. As held by the Supreme Court of Georgia, 242 Ga. at 712, under Georgia law the trial judge did not have the authority to remove the determination of damages from the jury. This holding was based upon the supremacy of the Georgia Civil Practice Act over laws of local application, and upon the provision of the Civil Practice Act providing for a jury trial, in default cases, on the issue of damages in actions *ex delicto*. The Supreme Court of Georgia held that the trial judge in the default judgments was required to submit the issue of damages to the jury, and that, accordingly, the damage awards must be set aside.

The above excerpts constitute what Appellee believes to be the sum of the purported constitutional issues presented in the motion for rehearing in the Georgia Supreme Court. Appellee respectfully submits that none of the

issues raised on the motion for rehearing or, indeed, in the Statement as to Jurisdiction, present any substantial question of federal law.

The issue which permeates Appellants' motion for rehearing and jurisdictional statement is clearly the contention that Appellants have been denied equal protection of the laws as a result of the decision of the Supreme Court of Georgia in overruling the grant of summary judgment in their favor and in setting aside the awards of damages granted by the trial judge in the default actions. The allegation of unequal treatment emerges repeatedly throughout the jurisdictional statement. Appellants proceed to show at great length how the Georgia Supreme Court erred in its decision. And, at page 30 of the Statement as to Jurisdiction, Appellants, we contend, set out in a nutshell their contention on this appeal.

> "And the challenge is that these statutes are adjudged to mean one thing in this case and another thing for others."

This contention clearly fails to raise any issue of substantiality under federal law. Appellants have not contended that they are the victim of any class-based discrimination or that they enjoy the status of members of a suspect classification; Appellants have invoked no fundamental interests or rights in their contention of denial of equal protection. They seem to be oblivious as to the distinction between strict scrutiny in review and minimal intrusion. In short, their complaint is simply that they have been denied uniformity of judicial decision and that they have been the victims of error by the appellate tribunal in Georgia. As was the case in *Beck v. Washington*, 369 U.S. 541, 554-55 (1962), Appellants' argument can be

reduced to a contention that Georgia law has been misapplied.

> "Such misapplication cannot be shown to be an invidious discrimination. We have said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions * * * [or] immunity from judicial error * * *.' Milwaukee Electric Railway & Light Company v. Wisconsin ex rel. Milwaukee, 252 U.S. 100, 106, 40 S.Ct. 306, 309, 64 L.Ed. 476 (1920). Were it otherwise, every alleged misapplication of State law would constitute a federal constitutional question."

Beck v. Washington, 369 U.S. 541, 554-55 (1962).

Under these circumstances, it is clear that Appellants' contentions based upon the equal protection clause are without merit and are so unsubstantial as not to need further argument.

Appellants' arguments regarding deprivation of due process are similarly without merit. Although not raised in the motion for rehearing, Appellants have contended in their Statement as to Jurisdiction that the constitutional rights of Mrs. Hilton were deprived when the Georgia Supreme Court found that service of process on Mrs. Hilton in South Carolina was proper. It is apparently Appellants' contention, as outlined at page 27(a) and 27(b) of the jurisdictional statement, that personal jurisdiction could not constitutionally be obtained over Mrs. Hilton, and that this somehow was material to the outcome in the Supreme Court of Georgia. In support of this vague due process allegation, Appellants cite *Shaffer v. Heitner*, ___ U.S. ___, 97 S.Ct. 2569, 53 L.Ed. 2d 683 (1977).

The record shows that Mrs. Evelyn Hilton was residing in South Carolina at the time of the filing of the equitable actions to set aside the default judgments. Pursuant to Ga. Code Ann. § 81A-104(e)(2), Mrs. Hilton was personally served with summons and complaint in the equitable actions. Section 104(e)(2) of the Civil Practice Act provides for personal service outside the State of Georgia in any proceeding *in rem* without regard to the residence of the person served.[1]

The Georgia Supreme Court found that this action to set aside certain judgments was an action *in rem* affecting property rights flowing from a judgment. The basis upon which Appellants contend that *Shaffer v. Heitner* applies to this case is not clear. However, it is clear from a reading of *Shaffer v. Heitner* that the test for the exercise of jurisdiction *in rem* was met in this case. In *Shaffer*, the Court held that:

> "[I]n order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient to justify exercising 'jurisdiction over the interests of persons in a thing.' The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the due process clause is the minimum contact standard elucidated in *International Shoe*."

Shaffer v. Heitner, ___ U.S. at ___, 97 S.Ct. at 2582.

[1] Ga. Code Ann. §81A-104(e)(2) provides as follows:

> "*Personal service outside the state*—Personal service outside the state upon a natural person may be made (i) in any action where the person served is a resident of this State and (ii) in any action affecting specific real property or status, or in any other proceeding in rem without regard to the residence of the person served. When such facts shall appear, by affidavit, to the satisfaction of the court, and it shall appear, either by affidavit or by a verified complaint on file, that a claim is asserted against the person in respect to whom the service is to be made, and that he is a necessary or proper party to the action, such court may grant an order that service be made by personal service outside the state. Such service shall be made by delivering a copy of the process together with a copy of complaint in person to the persons served.

Thus, the Court held that the mere statutory presence of property in Delaware was insufficient to provide the contacts sufficient to support the jurisdiction of the court over the individual defendants. No other contacts with the State of Delaware were established, and the Court held that the exercise of jurisdiction was inconsistent with the due process limitation on State power.

In the instant case, however, the subject of the litigation, the judgment obtained by Mrs. Hilton against Cambron as representative of Glover, was the property interest upon which jurisdiction was based. This is not a case, in other words, in which the property serving as the basis for State court jurisdiction is completely unrelated to the plaintiffs' cause of action. Here, Mrs. Hilton came into the State of Georgia in order to secure the judgment against Cambron. The cause of action upon which her judgment was based was an accident which also occurred in Georgia. The judgment was, of course, the subject of the litigation in which Canal sought to join her. Under these circumstances, the minimum contacts test elucidated in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), has clearly been met. As the Court noted in *Shaffer v. Heitner:*

> "For example, when claims to the property itself are the source of the underlying controversy between the Plaintiff and the Defendant, it would be unusual for the State where the property is located not to have jurisdiction."

Shaffer v. Heitner, supra, 97 S.Ct. at 2582.

It is clear, therefore, that Appellants' arguments with regard to the applicability of *Shaffer v. Heitner* are without merit and raise no substantial question of federal law on this appeal. In fact, the interjection of this issue at

this point, where it had not been raised on motion for rehearing, underlines the scatter-shot approach taken by Appellants on this appeal. The *Shaffer* argument clearly delineates the fact that Appellants are grasping to find a constitutional issue in this case.

Analysis of Appellants' remaining contentions regarding the deprivation of their constitutional rights reveals these contentions to be equally without merit. The argument that the proceedings in the United States District Court somehow precluded attack on the Polk County default judgments is contradicted by the orders of the district court entered in the case. Similarly, the contentions with regard to the Georgia Supreme Court's construction of the right to jury trial in default cases does not present any federal question. The Supreme Court of Georgia has consistently ruled that the Civil Practice Act takes precedence over conflicting local legislation. The Civil Practice Act clearly provides for jury trial on the issue of damages in *ex delicto* actions where default judgments are entered. *See* Ga. Code Ann. § 81A-155(a). The supreme court simply held that the trial judge in the default actions erred in directing that damages be entered in the amounts sought in the complaints without submitting this question to the jury as required under the Civil Practice Act. Clearly, Appellants have been deprived of no right to due process of law by virtue of this decision.

In short, Appellees contend that no substantial federal question has been raised on this appeal and that it is manifest that the questions presented are so unsubstantial as not to need further argument.

5.

The Appeal Must Fail Because The Decision Appealed From Was Clearly Based Upon Adequate Nonfederal Grounds As Articulated In The Opinion Of The Supreme Court Of Georgia.

Appellees contend that this appeal presents no federal question for review by this Court whatsoever. The issues presented on appeal involved solely questions of State law. These questions were presented to the highest court of the State of Georgia, were argued before that court, and were decided by that court on the basis of state statutory and decisional law. It will not be necessary for movant herein to discuss in great detail the questions of State law decided by the Supreme Court of Georgia. The opinion by the supreme court speaks for itself explicitly and articulately. Appellee submits that the opinion of the supreme court conclusively shows the basis upon which the court reached its decision. The opinion of the Supreme Court of Georgia was cearly based upon solund reasoning and logic and upon prior decisional and statutory law of Georgia.

6.

If Construed As A Petition For Writ Of Certiorari As Provided Under 28 U.S.C. § 2103, The Petition Clearly Should Be Denied As Failing To Present Any Important Question Of Federal Law.

Appellee relies upon its argument, *supra*, with regard to the substantiality of the federal questions raised on this appeal in support of its position that no important question has been raised on this appeal, and that, construed as a petition for writ of certiorari, the petition

should be denied. In essence, Appellants' arguments are those of a disgruntled and dissatisfied litigant perceiving a violation of due process and equal protection in the fact that the State's highest court has rejected its arguments on appeal. Appellants are complaining of no more than that the high court of Georgia has decided the cause adversely to their position. There are no constitutional issues in this case. Certainly, review by the Supreme Court cannot be automatically invoked anytime a litigant is dissatisfied with the opinion of its highest State court simply on the ground that the decision of the high court did not conform with appellant's view of the state law. And yet, when close examination is made, that is precisely the position taken by Appellants in this case.

Accordingly, Appellee submits that, whether construed as an appeal under 28 U.S.C. § 1257(2) or as an application for writ of certiorari, argument and further review by this Court is unwarranted and unjustified.

IV.

CONCLUSION

Wherefore, Appellee respectfully submits that, for the reasons outlined above, this appeal is without merit, and Appellee respectfully urges the Court to dismiss this appeal or, in the alternative, to affirm the decision of the Supreme Court of Georgia.

Respectfully submitted,

HURT, RICHARDSON, GARNER, TODD & CADENHEAD

By: s/ A Paul Cadenhead

CERTIFICATE OF SERVICE

I, A. PAUL CADENHEAD, Attorney for Canal Insurance Company, Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the ____ day of JUNE, 1978, I served copies of the foregoing Motion to Dismiss or Affirm on Appellants, Bobby C. Cambron, et al., by mailing a copy, in a duly addressed envelope, with sufficient postage prepaid, to Messrs. Cecil D. Franklin and Marson G. Dunaway, Jr., Post Office Box 269, Rockmart, Georgia 30153, Counsel for Appellants.

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